The Central Law Journal.

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## CURRENT EVENTS.

ALABAMA STATE BAR ASSOCIATION. — We have received from Alex Troy, Esq., Secretary of the Alabama State Bar Association, copies of the proceedings of the fifth, sixth and seventh meetings of that body, in recognition of our claim to be the organ of State Bar Associations. We observe with pleasure that this association meets semi-annually. Its next meeting will be held at Montgomery on the first Monday in December. It is no disparagement to the many excellent papers found in these proceedings to single out the address of Hon. George Hoadley, of Ohio, on the Limits of Municipal Law in a Democracy, at the fifth meeting, and that of Hon. John A. Campbell, of Louisiana, at the sixth meeting, is deserving of special mention. This latter paper has no title; but we venture to entitle it a paper on Slavery, the Late War and Re-construction. As the views expressed in this paper still divide political parties, we do not regard them as a profitable subject for discussion in our columns. There are many views in this paper with which we sympathize, and many with which we do not. As lawyers, we are bound to acknowledge the strength of his argument in favor of reforming institutions by lawful methods, and not by revolution. But this argument is one which is possibly capable of a different application from the one which Judge Campbell gives.

THE MONTANA BAR ASSOCIATION.—The Bar Association is getting to be a permanent American Institution. It has even entered the territories. As the organ of the Bar Associations, we take pleasure in calling attention to the fact that the Montana Bar Association met at Helena on August 12th. This was its first regular meeting. At present its meetings are semi-annual. We hope its practice of semi-annual meetings will be kept up. We venture to think that many of the State Bar Associations could more profitably hold semi-annual meetings than annual ones. Once a year is not often enough to accomplish much work. Twice a year would be better, and would not be overdoing a good thing. Many who could not attend a summer meeting could attend a winter one, and *vice versa*.

THE LATE JUDGE T. LYLE DICKEY.—Death has again invaded the Supreme Bench of Illinois, this time carrying off Judge T. Lyle Dickey, who has held a position on that bench for the last ten years. He was born in Bourbon County, Kentucky, in 1811, and was a practitioner at the bar in Illinois from 1835 to 1875, with the exception of brief periods of time which he occupied in editing a Whig paper, commanding a company in the Mexican war, and a division of cavalry in the late civil war; so that his connection with his profession, with short intervals, covers a period of fifty years. His mind was unusually active and penetrating; his social qualities were of a high order. He was not only in high favor with the legal profession, but was popular with the masses.

THE EASTERN REPORTER.—The first number of this new venture has come to hand, and we like its appearance very much. It is edited by John T. Cook, Esq., of Albany, and published by William Gould, Jr. & Co., of the same place, at the price of $10 per year. It is printed on clean, tough, white cotton paper, thin, but not so thin that the type strikes through it. In the selection of this quality of paper the publishers have been very happy. It is printed in clean, new brevier type, on a large page. Altogether it presents a typographical appearance superior to any existing publication of the same class. The cases reported in this number are from the Court of Appeals of New York, and the Supreme Courts of Rhode Island and Maine. The cases from New York are recent; those from Rhode Island and Maine are about six months old, and have already appeared in the advance sheets issued by the reporters of those States, from which, no doubt, the editor

of this publication has taken them. This merely indicates that the publishers of this venture are in haste to commence, and that their arrangements for getting new cases are, perhaps, not fully perfected. Particular attention is called to the fact that at the end of some of the cases, references are given to notes in "Moak's English Reports," and also the "American Reports." Wherever cases cited appear in either of these reports reference is also made thereto. In the meantime, where are the "Co-Ops?" Where are the Wests?"

## NOTES OF RECENT DECISIONS.

TRIALS. [EVIDENCE.] — ERROR TO ALLOW JURY TO DECIDE UPON THEIR PERSONAL KNOWLEDGE.—In *Douglass v. Trask*,[1] which was an action for breach of warranty of soundness of a horse, it became material to inquire into the nature of an enlargement on the horse's hind leg, which proved to be a "curb." Upon this point the judge instructed the jury as follows: "Now, then, upon the evidence of these experts and such explanations as you have had from counsel, what is a curb? You may infer from this evidence, or from such personal knowledge as you may have in relation to matters of this kind, which, in cases of this character you are obviously authorized to apply to the investigation, that such an injury is a result of a sprain or wrench of the ligaments binding the tendon of the joint, or it may be a mechanical injury to the covering, known as the sheath of the tendon around that joint, which results in an enlargement which impairs the free action of the joint (which has been described to you by the witnesses as being, primarily, somewhat soft), and you may infer, therefore, that some deposit has taken place." This instruction was held to be erroneous.[2] In the opinion of the court Libbey, J., said: "The judge may have intended to tell the jury that, in considering the evidence, they might bring to its consideration, in determining the weight to be given to it, such general, practical knowledge as they might have upon the subject, which would not transgress the rule of law applicable to the case, but he failed to do so. The subject under consideration was not one of general knowledge and observation, but one of science, upon which no witness, not specially qualified as an expert, could testify. It does not appear that any juror upon the panel was qualified as an expert to testify or give his opinion upon the subject under consideration; and still each juror may have thought he was, and under the instruction given, may have based his conclusion solely upon what he thought his personal knowledge was, disregarding the evidence submitted by the parties. The verdict thus given would not be 'according to the evidence given' them, but according to their own personal knowledge of the subject-matter under consideration."

JUSTIFIABLE HOMICIDE. [[TEXAS STATUTE.] —KILLING ONE TAKEN IN ADULTERY WITH SLAYER'S WIFE.—In Texas they have a statute making it justifiable homicide for a man to kill another man taken in adultery with the former's wife, and before they have separated. The statute is one of very doubtful policy, and we do not believe that the like of it can be found in the code of any other civilized State. Nevertheless in the recent case of Price v. State,[3] the Court of Appeals of that State extend it by construction so as to make it apply to a case where the husband has reason to believe from what he sees or hears, that his wife and the deceased either have committed adultery or are about to commit adultery, and to justify him in killing the latter after they have separated. The decision is utterly unwarranted by anything in the statute, and places a very low value upon human life.

FRAUDULENT BUTTER AND ADULTERATED TEA.—The Court of Appeals of New York has recently made itself the champion of fraudulent butter, by holding that the recent act of the legislature of that State which prohibits the manufacture of such butter is un-

[1] S. C. Me., Jan. 5, 1885; 1 Eastern Repr. 60.
[2] On the authority of State v. Bartlett, 47 Me. 388, and Schmitt v. N. Y. M. Fire Ins. Company, 1 Gray, 529.
[3] 1 Texas Ct. Repr. 140.

constitutional.[4] It has also come forward as the champion of adulterated tea; and one can scarcely read its decision refusing to enjoin the sale of such stuff at the suit of the Board of Health[5] without concluding that it is very tender on the subject of restraint of trade. With regard to the oleomargarine decision, there is room for the widest difference of professional opinion, and three courts at least had already taken the opposite view, in considering a statute substantially similar to that of New York;[6] since then the legislature had inhibited the manufacture and sale of a substance in itself entirely harmless when properly made, though almost universally palmed off upon consumers as butter, which it was not. But in the case now before the New York court the tea was admitted to be adulterated; but it was not adulterated bad enough. It was a baby, but a small one; and so the court refused to enjoin the sale of it. Perhaps Purdon was a wholesale dealer, and the court thought that though it was "adulterated and colored to some extent with offensive and noxious drugs and substances," it was good enough for the "rowdy West." The "rowdy West" has gone pretty extensively into the manufacturing business, and will no doubt find some way to pass the compliment back to the fraudulent East. But, in order to do the court no injustice, we give the reasoning from the opinion of the court by Ruger, C. J., by which the court justify the refusal to enjoin the selling of the adulterated tea: "The fact that the teas, the sale of which this action was brought to restrain, were adulterated, and that their possession for the purpose of sale to the general public was a nuisance subjecting the offenders to an indictment, and in case of sale, to actions for penalties for selling adulterated goods, cannot be successfully controverted; and yet this fact alone is insufficient to support the action. The plaintiffs have thereby established but one of the elements necessary to entitle them to the relief demanded. Courts will not in all cases interfere by way of injunction to restrain the continuance of an illegal trade, the abatement of a nuisance, or the prosecution of a dangerous employment.[7] Its power, however, to do so in case of the exercise of any trade or business which is either illegal or dangerous to human life, detrimental to health, or the occasion of great public inconvenience, is not only conferred by the provisions of the statute, but belongs to the general powers possessed by courts of equity to prevent irreparable mischief and obviate damages for which no adequate remedy exists at law.[8] Whatever source of jurisdiction is appealed to, the rule governing its exercise is the same, and the court will inquire not alone as to the unlawfulness or offensiveness of the act complained of, but also as to its extent, the circumstances surrounding its exercise, and the degree of danger to be apprehended from its continuance. It was said in the case of Jordan v. Woodward.'[9] 'It is not every violation of the rights of another which may be ranked under the general head of nuisance which will authorize the interposition of this court by means of an injunction. It must be a case of strong and imperious necessity, or the right must have been previously established at law, or it must have been long enjoyed without interruption. The ground of equity jurisdiction in such cases has been said to be to prevent irreparable mischief and also to suppress offensive and vexatious litigation.'[10] He also says: 'That in all cases of this sort, courts of equity will grant an injunction to restrain a public nuisance only in cases where the fact is clearly made out upon determinate and satisfactory evidence. For if the evidence be conflicting and the injury to the public doubtful, that alone will constitute a ground for withholding this extraordinary interposition.'[11] It was held in Eastman v. Company,[12] that 'the plaintiffs should, of course, show by their proof a case of strong and clear injustice, of pressing necessity and imminent danger, of

[4] People v. Marx, 32 Alb. L. J. 6.

[5] Board of Health of New York v. Purdon, 1 Eastern Repr. 9.

[6] State v. Addington, 12 Mo. App. 215; s. c. affirmed 77 Mo. 116; *Re* Brosnahan, 18 Fed. Repr. 62 (before Mr. Justice Miller at circuit). The recent decisions of the New York court is assailed by the Washington Law Reporter and defended by the Albany Law Journal and the Cincinnati Law Bulletin.

[7] Wolcott v. Melick, 3 Stockt. 204; Attorney-General v. Utica Ins. Co., 2 Johns. Ch. 371.

[8] N. Y. Cons. Act of 1882, §§ 636, 637 and 646; Story's Eq. Jur., §§ 921, 924; Eden on Injunctions, Chap. 11.

[9] 38 Me. 424.

[10] Story's Eq. Jur., §§ 923, 925.

[11] Id., § 924, a.

[12] 47 N. H. 88.

great and irreparable damage, and not of that nature for which an action at law would furnish a full and adequate remedy.' In the Earl of Ripon v. Hobart,[13] it was said by Lord Chancellor Brougham that 'it is always to be borne in mind that the jurisdiction of this court over nuisances by injunction at all, is of recent growth, has not till lately been much exercised, and has at various times found great reluctance on the part of the learned judges to use it even in cases where the act or thing complained of was admitted to be directly and immediately hurtful to the complainant.' The language used in the consolidating act giving courts jurisdiction to interfere by injunction to restrain nuisances in the city of New York, has not changed the established rule as to the imminency of the danger to be apprehended or the necessity of such a remedy to avoid irreparable injury. By that act it must appear that the injunction is "needed," among other things, to prevent 'serious danger to human life or serious detriment to health,' and unless the facts of this case bring it within the requirement, that it is imperatively necessary to prevent the consequences described, the plaintiffs have failed to show such a case as entitles them as matter of right to the remedy demanded. If we regard the findings of the court below alone, we see that although it has found the teas in question were adulterated and colored to some extent with offensive and noxious drugs and substances, it still reaches the conclusion that no sufficient evidence had been produced to prove that the use of said tea was dangerous to human life or detrimental to health, and unwholesome, or that the injunction prayed for is needed to prevent serious danger to human life or detriment to health, or that the said teas, or the selling or offering for sale of the same, is a nuisance."

[13] 3 M. & K. 180.

## POWERS OF BANK PRESIDENTS.

*I. Their Powers Generally Considered.*

*Status of the President.*—The president the general executive officer of a bank.

*Powers Classified and Considered.*—His powers, like those of bank cashiers, are of three general classes: First, such as are inherent in the office, and which cannot be denied by the bank, unless it be shown that their want was known to the other contracting party at the time of the transaction; second, such as are presumed to have been conferred on him, but which may be shown, in any case, not to have been so conferred, and, third, such as are exercised only by virtue of special authority granted by the directors.

The powers which are inherent in the office, and which, therefore, he may exercise so as to bind the bank in dealings with persons possessing no other knowledge, are such as are necessary to the transaction of the usual business of the bank in the usual way; or, as has been said, which come within the scope of the general usage, practice and course of business conducted by the bank.[1]

The powers which are presumed to have been conferred on the president, but which may be shown not to have been so conferred, are those which are necessary to the doing of those things without the ordinary course of his duties which it would seem he should do, and which, therefore, the law presumes him authorized to do until the contrary appears.

The powers which are exercised only by virtue of special authority granted by the directors, are such as are not only without the ordinary course of his duties, but are within the legislative and judicial province of the directors.[2]

He may be authorized by the directors to do any act which they are authorized by their charter to do, unless the act can by the charter be done only by the directors themselves.[3]

And such authority need not be expressly conferred. It is sufficient where such facts exist as constitute clearly a public holding out that the particular act done or contract entered into was within the scope of his legitimate delegated authority.[4] Thus, in Rech v.

[1] Minor v. Mechanics' Bank of Alexandria, 1 Pet. 46; Neiffer v. Bank of Knoxville, 1 Head. 162. See also Wyman v. Hallowell & Augusta Bank, 14 Mass. 58; Salem Bank v. Gloucester Bank, 17 Ib. 1, 29; Foster v. Essex Bank, 17 Ib. 479; Austin v. Daniels, 4 Den. 299.

[2] Bank of East Tennessee v. Hooke, 1 Coldw. 156; Rhodes v. Webb, 24 Minn. 292; Bank of Com. v. Bank of Buffalo, 6 Paige, 497; Percy v. Millandon, 3 La. 568; Bank of Healdsburg v. Bailhall, 3 W. C. Rep. 140.

[3] Wellsburg Bank v. Kimberlands, 16 W. Va. 555.

[4] Wellsburg Bank v. Kimberlands, *supra*; Burton v.

State Nat. Bank,[5] where the president informed a customer that they were about to reorganize the bank, and that if he would act as director, and his firm would give the bank all their business, as they had done before, and use their influence in its behalf, that they would give him ten shares of the stock; and he accepted the proposition, and was elected and served as a director, and the firm of which he was a member continued to do business with the bank, it was held that as the president professed to act for the bank in the transaction, the bank, by receiving the benefits derived from the contract, ratified his action and was bound.

*II. Their Powers Specifically Considered.*

*Power to Receive and Pay.*—The president of a bank has general authority to receive deposits and issue certificates therefor,[6] and to apply its funds to the payment of checks of depositors.

*Power to Certify Checks.*—He may also, pursuant to a general authority from the directors, certify checks drawn upon the bank, but such authority does not extend to checks drawn by himself.[7]

*Power to Indorse.*—The president and directors of a bank, having by the charter full power to conduct its affairs, the former may, by the direction of the latter, transfer by indorsement its negotiable paper,[8] and this to himself,[9] but a particular vote for this purpose need not be passed by the directors.[10] Such authority may be implied, as, for instance, by his habit, known to the directors, of doing acts of the same general character.[11]

The officers of a bank have, however, no authority to bind it as indorsers for accommodation; and such indorsement is void in the hands of everyone who has notice that it is for such purpose.[12]

*Power to make Admissions and Declarations, Binding on Bank.*—The president has power to make admissions and declarations, binding on the bank, within the scope of the duties of his office.[13] Thus, his declarations that a note was paid on which suit is afterwards brought are admissible against the bank.[14]

But the bank is not bound by his declarations or confessions beyond the legal sphere of his action.[15] It has been held, for instance, that after a certificate of deposit has been paid, he cannot by his admission obligate the bank to pay its amount a second time to other parties.[16]

*Power to Receive Notice.*—Notice to the president is in general notice to the bank;[17] but whether or not such notice will bind the bank, depends much upon whether it is the duty of such officer to act upon it. If it is, the notice will be binding, but otherwise it will not usually have such effect. Thus in Fulton Bank v. New York and Sharon Canal Co.,[18] where the president knew that a person depositing money in the bank, on account of a corporation, had no authority to draw out such money, but had no knowledge that he intended so to do, and the depositor afterwards withdrew the money, without the knowledge of the president, it was held that the notice to him was not such notice to the bank as to render it liable for the loss of the deposit.

*No Power to Release Claims.*—The president of a bank has no authority, as such, to release the claims of the bank against any one. Such authority must be derived from the directors by their vote, or from their assent express or implied.[19]

*Power Respecting Mortgages for Shares.*—

Burley, 9 Biss. C. Ct. 253; Winton v. Little, 94 Pa. St. 64; Smith v. Lawson, 18 W. Va. 212; s. c., 41 Am. Rep. 688; Eastern Townships Bank v. Vermont Nat. Bank, 22 Fed. Rep. 184, and see authorities cited 20 Cent. L. J. 127., n. 5.

[5] 7 Neb., 201.

[6] Hazleton v. Union Bank, 32 Wis. 34.

[7] Claflin v. Farmers, etc., Bank, 25 N. Y. 293.

[8] Merrick v. Trustees, etc., 8 Gill. 59; Spear v. Ladd, 11 Mass. 94; Northampton Bank v. Pepoon, Ib. 288.

[9] Palmer v. Nassau Bank, 78 Ill. 380.

[10] Northampton Bank v. Pepoon, and Spear v. Ladd, *supra*.

[11] Smith v. Lawson, 18 W. Va. 212; s. c., 41 Am. Rep. 688.

[12] Bank of Gennessee v. Patchin Bank, 13 N. Y. 309; 19 N. Y. 312.

[13] Spalding v. Bank of Susquehana County, 9 Pa. St. 28; Hazleton v. Union Bank, 32 Wis. 34; Gould v. Cayuga Nat. Bank, 56 How. Pr. 505. But see Henry v. Northern Bank, 63 Ala. 527.

[14] Bank of Monroe v. Field, 2 Hill (N. Y.) 445.

[15] Wyman v. Hallowell & Augusta Bank, 14 Mass. 58; Salem Bank v. Gloucester Bank, 17 Ib. 1, 29.

[16] Hazleton v. Union Bank, 32 Wis. 34.

[17] Porter v. Bank of Rutland, 19 Vt. 410.

[18] 4 Paige 127.

[19] Olney v. Chadsey, 7 R. I. 224; Hodge v. Nat. Bank, 22 Gratt. 51; Gallery v. Albion Nat. Ex. Bank, 41 Mich. 169.

The president is the person to whom mortgages for shares should be made payable, and he is the proper person to assign the same.[20]

*Agreement to Give Notice to Surety.*—An agreement by an officer of a bank to give notice to a surety in case of a default on the part of the makers of a note pledged as collateral, does not bind the bank in the absence of some authority, either express or implied, conferred upon such officer to make the agreement.[21]

*Power to Purchase and Deed Real Estate.*—It is not one of the inherent powers of a bank president to purchase real estate for the bank in the usual way, but it is held that where he is also the general agent and manager of the bank, he may purchase such property to secure payment of a doubtful debt, in order to save the debt, or a portion of it from loss.[22] Nor is it within the province of the president, or the president and cashier, to make any assignment of the corporate property requiring the use of the corporate seal, without the assent and authority of the board of directors, where the charter creates or provides for such a board, and intrusts the management of the affairs of the corporation to the same.[23] But it is decided in Veasey v. Graham,[24] that where the charter declares that "all contracts on the part of the corporation, shall be binding, provided the same shall be signed by the president and countersigned by the cashier," the president may execute a binding deed of its real estate, the cashier countersigning.

*No Power to Execute Mortgage.*—The president, independent of the board of directors, has no power to execute a mortgage of the bank property. Nor has he merely in conjunction with the cashier and a "finance committee" of the board of directors; and this although in fact the management of the affairs of the bank is committed, for the most part, to the president and cashier.[25]

*Powers with Respect to Suits.*—It is to be presumed that the president of a bank has authority to institute and carry on proceedings for the collection of demands due the bank, and to appoint an attorney therefor;[26] to appear and answer for it, and employ counsel for its defence.[27]

In Alabama it is the holding that a notice for judgment, by motion, made by the president, is sufficient, and this even where it is by one assuming to be president whether he be so *de jure*, or not, if the act is adopted by his successor, who is legally president of the bank,[28] and in Case v. Hawkins,[29] it is decided that the president may contract, on sufficient consideration, with the defendant in a judgment in favor of the bank, to enter a *remittitur* of the judgment. So in Winton v. Little,[30] it was held that the bank was bound by a partial release of a judgment lien upon lands by its president, in whose name the judgment note was taken, and whose acts in the case it had ratified for a number of years. But in Spyker v. Spence,[31] the Alabama court holds that the president of a banking corporation, the charter of which does not confer the power either expressly or incidentally, is not authorized, without the permission of the directors, to whom is intrusted the management of the concerns of the institution, to stay the collection of an execution against the estate of one of its debtors, and the limits of the president's power with respect to suits are still further defined in the case of the State v. Citizen's Savings Bank,[32] where it is held that the officers of a bank are without authority to waive the service of a petition praying a forfeiture of its charter, or to waive the delay within which third persons may intervene to protect their interests, or of filing an answer which virtually confesses the forfeiture of the charter.

L. K. Mihills.

Akron, Ohio.

[20] Valk v. Crandall, 1 Sandf. Ch. 179.
[21] New Hampshire Savings Bank v. Downing, 16 N. H. 187.
[22] Libby v. Union Bank, 99 Ill. 622.
[23] Hoyt v. Thompson, 5 N. Y. 320.
[24] 17 Ga. 99.
[25] Legget v. N. J. Banking Co., 1 N. J. Eq. 441.
[26] American Ins. Co. v. Oakley, 9 Paige. 496; Mumford v. Hawkins, 5 Den. 355. But it is held in Citizens Bank v. Keim, 10 Phila. 311, that a power of attorney to institute suit, executed by the president without authority from the directors, is not sufficient.
[27] Savings Bank etc. v. Benton, 2 Metc. (Ky.) 240.
[28] Blackman v. Branch Bank at Mobile, 8 Ala. 103.
[29] 53 Miss. 702.
[30] 94 Pa. St. 64.
[31] 8 Ala. 333.
[32] 31 La. An. 836.

## "THE LAW OF THE LAND."

"The law of the land" and "due process of law" have the same signification. The latter is used for the former, in an English statute.[1] "Due process of law, in each particular case, means such an exertion of the powers of the government as the settled maxims of the law permit and sanction, and under such safeguards for the protection of individual rights as these maxims prescribe for the class of cases to which the one in question belongs.[2]

In 1884 the United States Supreme Court said that "due process of law" is following the general rules established in our system of jurisprudence for the security of private rights, which rules are appropriate to the case, and just to the parties to be affected.[3]

The doctrine of "the law of the land" comes to us from *Magna Charta*.[4]

This section provides that no freeman shall be imprisoned, disseized, or injured, "unless by the lawful judgment of his peers, or by the law of the land:" *Nisi per legale judicum parium suorum vel per legem terrae.* This doctrine has been embodied in the United States Constitution.[5]

In the Illinois Constitution of 1818, 1848 and 1870, is found a change in the English translation, which indicates the different application of this doctrine. In the constitutions of 1818 and 1848 the phrase "no freeman" is employed. In that of 1870 "no person" is used. The former is a literal translation of "*nullus liber homo*," of *Magna Charta*, and means exactly what it says, as is proved by reading the "black laws" enacted by the State of Illinois. Under the Illinois Constitutions of 1818 and 1848, a slave had no rights, and by the "black laws" no negro had any privileges.[6]

The Fourteenth Amendment to the United States Constitution has changed the doctrine of "*nullus liber homo*" to "*nullus homo*," and the States are following, as Illinois did in 1870,[7] and change the phrase "no freeman" to "no person."

[1] 37 Eliz., C. 8.
[2] Cooley's Const. Lim. 356.
[3] Hagar v. Reclamation District, 4 Sup. Ct. Rep. 663.
[4] § 29.
[5] V. and XIV. Amendments.
[6] R. S. 1845, Ch. 74.
[7] Const. 1870, Art. II, § 8.

Many of the English statutes subsequent to *Magna Charta* declare that no man shall be taken or imprisoned by suggestion or petition to the king or his council, unless it be by indictment or the process of the common law; that no man's land or goods shall be sold in violation of the law of the land; nor shall he be forejudged of life or limb contrary to the law of the land; nor shall he suffer death until he has had opportunity to answer by due process of law.[8]

The words "due process of law" are technical and mean that no person shall be convicted unless by indictment or presentment of good lawful men, or by writ original of the common law.[9]

The trial must be according to the prescribed forms and solemnities of the common law for ascertaining the guilt or innocence of a party, or to determine the title to property.[10] It must be according to the common law, because the States where this doctrine is accepted, have adopted the common law. A person has no property nor vested interest in any rule of the common law. The common law is only one of the forms of the municipal law, and is no more sacred than any other.[11]

Some of the States of the Union were formed out of ceded territory, and until the common law was adopted by them, its rules were not accepted. Louisiana, Missouri and Arkansas were ceded to the United States by France. Florida by Spain. Texas was an independent republic coming from Mexico. California was derived from the Mexican Republic. Texas, Missouri, Arkansas, and California adopted the common law by express legislation. Louisiana bases her system of jurisprudence on the French law, which is the Roman civil law, with few modifications made at the time of her purchase by the United States.

The rights and property of a person under the Louisiana law are as secure as in States

[8] 5 Edw. III. C. 9; 25 Edw. III. St. 5 C. 4; 28 Edw. III. C. 3.
[9] 2 Inst. 50; 3 Story on Const., 661.
[10] Taylor v. Porter, 4 Hill (N. Y.) 146; Jones v. Robbins, 8 Gray 329; Hake v. Henderson, 4 Dev. 1; Rowan v. State, 30 Wis. 148; Jones v. Perry, 10 Yerg. 59; Sullivan v. Oneida, 61 Ill. 243; Wynehamer v. People, 13 N. Y. 390; People v. Haws, 37 Barb. 455; 19 Wend. 659.
[11] Munn v. Ill., 94 U. S. 115.

which have adopted the common law. There is nothing, however, any more sacred in the common law, or in the civil law in Louisiana, than there is in a statute enacted under suitable constitutional limitations. Following such a statute is due process of law, irrespective of a writ of the common law.

Indictment or presentment by a grand jury is not necessarily required in order to come within the law of the land. Illinois has already provided that the grand jury may be abolished according to law.[12] Due process of law does not necessarily require an indictment by a grand jury in prosecution by a State for murder.[13] The United States Constitution does not guarantee the right of trial by jury in all cases in the State courts.[14]

The provisions of the United States Constitution, requiring prosecutions of crimes to be by indictment, have reference only to proceedings before the tribunals of the United States courts, and do not apply to the proceedings of the State courts.[15] Due process of law may limit the action of the legislature. It has a broad and comprehensive meaning and limits each branch of the civil government.[16] The constitutional provisions mean that no person shall be denied the equal protection of the law of the land within the jurisdiction of the State.[17]

Due process of law means in due course of legal proceedings, according to the regulations which have been established for the protection of private rights.[18] Due process of law protects the person from arbitrary exercise of the power of the government, unrestrained by the established principles of private rights and distributed justice.[19] The common law, as a rule of action, may be changed at will by the legislature, under constitutional limitations.[20] Due process of law, where imposed by statute, must be a process within constitutional powers of the legislature and must show authority on its face.[21]

[12] Const. (1870) Art. II. § 8.
[13] Hurtado v. California, 110 U. S. 527.
[14] Walker v. Sauvinet, 92 U. S. 90.
[15] Rowan v. State, 30 Wis. 149; Jane v. Com., 3 Met. (Ky.) 22; Twitchell v. Com., 7 Wall. 321.
[16] Davidson v. New Orleans, 96 U. S. 107.
[17] *Ex parte* Virginia, 100 U. S. 346.
[18] Westervelt v. Gregg, 12 N. Y. 209.
[19] Bank of Columbia v. Okely, 4 Wheat. 235.
[20] Munn v. Ill., *supra*.
[21] Clark v. Lewis, 35 Ill. 417.

Legislative power is not the supreme power of the land. The supreme and absolute power and authority of the State lie in the people; the legislature exercises delegated powers, controlled by the constitution.[22]

Due process of law may be by a writ of the common law, except in Louisiana, or by a statute of a State or of the United States, enacted under constitutional limitations, as the United States and State constitutions are the highest and absolute authority of the people.

Bloomington, Ill. D. H. PINGREY.

[22] Phoebe v. Jay, 1 Ill. 268.

## STATUTE OF LIMITATIONS — WHEN CAUSES OF ACTION FOR TORTS ACCRUE.

### MITCHELL v. DARLEY MAIN COLLIERY CO.*

STATUTE OF LIMITATIONS [*Torts*] — *Cause of Action for Injury to Real Property Accrues from Accrual of Injury and not from Date of Act Producing it.* — The plaintiff was the owner of certain land, and in the years 1867 and 1868 the defendants worked a seam of coal lying under the plaintiff's land, and thereby caused that land to subside. In consequence of this subsidence some cottages belonging to the plaintiff, built upon the land, were damaged and were then repaired by the defendants. In the year 1882 a further and second subsidence of the plaintiff's land took place, owing to the same workings of the defendants in the years 1867 and 1868, and the plaintiff's cottages were again damaged. *Held*, in an action to recover damages for this second subsidence, that the plaintiff was entitled to maintain the action, and that his right of action was not barred by the Statute of Limitations.

Lamb v. Walker, (38 L. T. Rep. N. S. 643; 3 Q. B. Div. 389) overruled.

Nicklin v. Williams, [10 Ex. 259) overruled.

This was an appeal from a judgment of Hawkins, J., on further consideration.

The action was brought to recover damages for injuries done to three cottages and some small quantity of land belonging to the plaintiff.

The writ was issued on the 27th Dec., 1882, and when the action itself came on for trial before Hawkins, J., at Leeds, in August 1883, it appeared that the facts were as follows:

The plaintiff became the owner, in the year 1866, of six perches of land, situate in the parish of Darfield, in the county of York. The defendants were the lessees of a seam of coal lying under the plaintiff's land and the land adjoining, and they worked the said seam of coal during the years 1867 and 1868, but not afterwards. Owing

* S. C., 52 L. T. (N. S.) 675, as reported by A. A Hopkins, Esq., Barrister-at-Law.

to this working by the defendants, a subsidence of the plaintiff's land took place between the years 1868 and 1871, and six cottages belonging to the plaintiff which then stood upon that land were damaged by the subsidence and were repaired by the defendants. About the year 1878 these six cottages were pulled down by the plaintiff, and three other cottages were erected on their site. In the year 1882 a further and second subsidence, but which was caused by the same workings of the defendants in the years 1867 and 1868, took place, and in consequence damage was done to the plaintiff's land and to the three cottages then standing thereon. The action was brought to recover damages in respect of the injuries arising out of the subsidence which took place in the year 1882, and the defendants pleaded (*inter alia*) that the alleged causes of action did not arise within six years before action brought, and that the plaintiff's right to sue was barred by the Statute of Limitations.

The jury was discharged by consent, and the case was reserved by Hawkins, J., for further consideration, and, upon further consideration, the learned judge ordered judgment to be entered for the defendants, holding himself bound by the decision of the Queen's Bench Division in Lamb v. Walker, (38 L. T. Rep. N. S. 643: 3 Q. B. Div. 389).

The plaintiff appealed.

*Wills*, Q. C. and *C. E. Ellis* for the plaintiff.—

This is in effect an appeal from the judgment of the majority of the Queen's Bench Division in Lamb v. Walker (*ubi sup.*). It is submitted that the judgment of Cockburn, C. J., in that case states correctly the law to be applied to such cases as this, and that the judgment of the court ought to be overruled. The judgment of the court in that case was founded upon the case of Nicklin v. Williams (10 Ex. 259), and that decision cannot now be supported in view of the judgments in Backhouse v. Bonomi (4 L. T. Rep. N. S. 754; H. L. Cas. 503). In 1882 a separate and distinct cause of action accrued to the plaintiff, and the plaintiff is entitled to bring his action in respect of it. They also referred to Whitehouse v. Fellowes, 4 L. T. Rep. N. S. 177; 10 C. B. N. S. 765; Shadwell v. Hutchinson, 2 B. & Ad. 97.

*Forbes*, Q. C. and *Pain* for the defendants.—

The defendants have not worked the mines since the year 1869, and in the year 1871 the subsidence took place which gave rise to the cause of action. The defendants then repaired the damage done to the plaintiff, and by so doing satisfied all existing and future claims arising out of their wrongful acts. The court will not now, after so long a lapse of time, overrule Nicklin v. Williams. They referred to Marshall v. Ulleswater Steam Navigation Company, 25 L. T. Rep. N. S. 793; L. Rep. 7 Q. B. 166.

*Wills*, Q. C., in reply, referred to Smith v. Thackerah, 14 L. T. Rep. N. S. 761; L. Rep. 1 C. P. 564.

BRETT, M. R.—In this case the plaintiff is the owner of the surface and the defendants own the mines under the surface; and the plaintiff has brought his action for an injury to his property arising from something done by the defendants upon their own property. In the year 1868 the defendants worked out a certain seam of coal that was under and supported the surface soil belonging to the plaintiff, and, the support being thus interfered with, a subsidence took place, and some cottages then standing on the land belonging to the plaintiff were damaged. The plaintiff then made a claim against the defendants in respect of that damage, and repairs which satisfied the plaintiff were done by them. I take it that this was just as if an action had been brought by the plaintiff against the defendants and damages recovered. It is not now alleged that any further damage has been done to the plaintiff's property by that subsidence, that is, by the subsidence of 1868, or soon after. The repairs were done and there was an end of the damage, and if the earth had not again moved there would have been no further injury to the houses. But after some interval, either in consequence of something done by someone else, or in consequence of the omission by the defendants to do anything, but certainly not in consequence of any fresh excavations on the part of the defendants, a fresh subsidence took place; the plaintiff alleges that this fresh subsidence has done him a further injury, and now brings his action to recover damages for that injury. The objection taken on the part of the defendants is, that the action is brought too late, inasmuch as it is brought more than six years after that first subsidence which gave the plaintiff his cause of action; and it is urged that, when the repairs which I have mentioned were executed by the defendants, the plaintiff could have recovered, and must be taken to have recovered, prospective damages for any injury that might accrue from the same cause of action thereafter. The reply on the part of the plaintiff to that argument is this: The defendants were perfectly within their rights in excavating their own minerals, their doing so gave him no right of action against them as long as they did not hurt him; but in 1868 they did something which did give him a cause of action, because shortly after that time a subsidence of the surface took place and damage was done to the plaintiff, and thereupon his cause of action arose. That cause of action was settled when the defendants repaired the damage that was done, but now they have done him a wholly independent injury, because they have again caused his land to subside. It is true that this new subsidence has happened upon the same spot as the old subsidence but it is none the less a new one. It has been caused by the excavation made in 1868, or by leaving that excavation wholly unsupported until 1882. It is no answer to the plaintiff to say that the *causa causans* of the new subsidence is the same thing as the *causa causans* of the subsidence of 1868; the actual *causa*

*causans* gave the plaintiff no right of action in either case, but the two separate results from it have given him two causes of action, and although it may true to say that two actions for damages cannot be maintained for the same cause of action, yet there may be any number of successive causes of action. This is the argument of the plaintiff, and this is the whole dispute between the parties, and we must now consider what is the real cause of action. The question what is the real cause of action in such a case as this was raised in the case of Backhouse v. Bonomi, (*ubi sup.*) where it was argued that the cause of action was the excavation and not the subsidence, that the subsidence was merely a damage resulting from the excavation, and therefore it was argued on the part of the defendant that the action was brought too late because it was not brought within six years of the excavation, although it was brought within six years of the subsidence. In that case the judges were, in effect, asked whether, when there is a subsidence, the result of an excavation, the Statute of Limitations runs from the time of the excavation or of the subsidence; and the answer was, that the action could be brought at any time within six years after the mischief was done. The House of Lords held, as it seems to me, that the excavation was not the cause of action, because the excavation not being itself a wrongful act, cannot be made wrongful by something which happened afterwards, and therefore the excavation is only the cause of the cause of action, the real cause of action being the subsidence and that alone. Therefore it was held that the Statute of Limitations ran from the time when the cause of action accrued, and that was the moment of the subsidence. Therefore it seems to me to follow from the logical consequences of the reasoning in the case of Bonomi v. Backhouse, that successive subsidence, when they are independent, are successive and independent causes of action. The case of Nicklin v. Williams (*ubi sup.*) was prior to the case of Backhouse v. Bonomi (*ubi sup.*) and I think that the latter decision shows that the judgment in the earlier case was wrong, though it was not necessary for the House of Lords to overrule it. I think that the case of Nicklin v. Williams (*ubi sup.*) is in point in this case, and that if we upheld it we must give judgment for the defendants. It is true that the question in that case was raised upon demurrer, but it was precisely the same as that now raised. The defense was, that the cause of action in respect of the subsidence had been satisfied. The plaintiffs pleaded as a new assignment that they were not suing for that cause of action which had been satisfied, but for a new and different cause of action, namely, a subsequent subsidence. It was argued for the defendant that the new assignment was bad, as it was only a new assignment of a damage which was the result of a former cause of action. The Court of Exchequer upheld the argument for the defendant, and decided that the new assignment was bad. Although they did not in terms say so, I think that their judgment was based on the ground that the new assignment was really a claim for more damages than had been recovered in the first action, and that the damages claimed were damages for the same cause of action. Therefore the result is, that where an excavation has been left which causes one subsidence, if it is still left and causes another subsidence, then the second subsidence is a part of the damages of the first cause of action, and is not itself a new cause of action. But if the subsidence itself is the cause of action, and if the two subsidences are different and independent, although the *causa causans* of both is the same, it seems to me that there are two different causes of action, and then the decision in Nicklin v. Williams (*ubi sup.*) was wrong. I have already said that in my view the logical conclusion from Backhouse v. Bonomi (*ubi sup*) shows distinctly that Nicklin v. Williams was wrong. Therefore I am of opinion that Nicklin v. Williams cannot be supported as good law, and we must now say that it is overruled. She next case I come to is the case of Whitehouse v. Fellowes (*ubi sup.*) That was not a mining case, but it raised precisely the same question of principles. In that case the trustees of a certain turnpike road made a covered drain by the side of a highway in such a manner that it collected water in it and that water flowed away into the plaintiff's mine. The defence relied upon was a statutory defence that the defendants had made the drain more than three months before action, but it appeared that damage had occurred to the plaintiff within the three months.

The court held that the *causa causans* was a continuing cause, and was a cause which, if thereby damage was ccasioned to the plaintiff, would immediately upon that damage give him a cause of action; and further, that as the defendants kept the drain in such a condition that it again injured the plaintiff, the *causa causans* being the same as before, still there was fresh injury, and a fresh cause of action when that fresh injury was sustained. Each recurrence of the damage was held in that case to constitute a new injury, and the Statute of Limitations was held to run from the time of each damage arising. I think it is plain that the case of Whitehouse v. Fellowes *ubi sup.*) is directly in conflict with the case of Nicklin v. Williams (*ubi sup.*), and it seems to me impossible that both those cases can stand together. I have already intimated that, in my opinion, Nicklin v. Williams was wrongly decided, and I therefore come to the conclusion that Whitehouse v. Fellowes must be upheld as correctly expressing the law upon the subject. Lastly, I come to the case of Lamb v. Walker (*ubi sup.*); and the fact that in that case, which was decided after the other two cases and after Backhouse v. Bonomi (*ubi sup.*), two learned judges were directly in conflict, shows how difficult this question is. After a careful analysis of the judgments of the Chief Justice and of Manisty, J., in the case of Lamb v. Walker, I think we are bound to disagree with one of

them; they appear to me to be directly in conflict. The judgment of the Lord Chief Justice might have been founded entirely on Backhouse v. Bonomi (*ubi sup.*), but instead of this he appears to me to examine the whole subject afresh, and he gives most forcible reasons to show that in these cases the only cause of action is the subsidence of the plaintiff's land, and that, if that subsidence has been brought about by the defendants, each subsidence is a new cause of action. The Lord Chief Justice goes on to put the case thus, and I cannot see any answer to it: He says that, where an excavation has been made and a subsidence has taken place, it may be true that for all effect, existing and prospective, of that subsidence the person injured ought to sue at once. Very likely he ought, I am inclined fo agree with that, though it is not necessary to decide it in this case. But what is to be done as to a new subsidence? The mine-owner, who knows that the effect of his excavation has been to injure his neighbor's property, has two courses open to him: he may leave the excavation as it is and run the risk of it causing a new subsidence; or he may prop it up and counteract the possibility of fresh damage. The Lord Chief Justice points out that the jury who are to assess the damages for the first subsidence cannot possibly give damages for a prospective new subsidence which the defendant has full option to prevent if he pleases, and that the jury cannot take into consideration the prospective damage which may occur from a new subsidence when it may be that, at the very moment they are doing so, the mine-owner may be taking steps to render any further subsidence impossible. I have said that I see no answer to this way of putting the case, and I think that the reasoning of the Lord Chief Justice, even without reference to Backhouse v. Bonomi, *ubi sup.*, is conclusive to show that each subsidence is a fresh cause of action. Further, it seems to me to be in accordance with Backho..se v. Bonomi, and to be the logical result of that case. Therefore, with great deference to my brother Manisty, I think the judgment of the Lord Chief Justice is to be preferred. I do not examine the judgment of Mellor, J., at length, as it seems to me merely an inquiry into the state of authority at the time. I agree, then, with the Lord Chief Justice's view that each subsidence is a new cause of action, although the *causa causans* of each subsidence may be the same. The plaintiff, therefore, is right in this case, and is entitled to succeed. The result of our judgment is, that the case will be referred to some arbitrator who will have to determine the amount of damages caused by the second subsidence; but what the measure of damages in that inquiry will be it is not for us now to determine.

BOWEN, L. J.—This case raises a very important question, and I should have thought it well to consider the authorities before giving my judgment upon them, if it were not that we have recently had them before us in another case (see Brunsden v. Humphries, 51 L. T. Rep. N. S. 529), and that we are familiar with all of them. The short question raised here is, whether we are to follow the judgment of the Lord Chief Justice Cockburn in Lamb v. Walker, *ubi sup.*, or those of Manistry and Mellor, JJ. The short facts are these: The plaintiff is the owner of the surface. In the year 1868 a subsidence of the surface took place in consequence of the excavations of the defendants, and the damages caused by that subsidence were repaired and paid for by the defendants. Nothing further happened for more than a dozen years, but in 1882 a further subsidence, traceable to the precisely same excavation, took place and caused further damage. Now what is the cause of action with respect to this second subsidence in 1882? Is it the original excavation, or is it the subsidence in 1882, or is it a combination of the two? The period from which the Statute of Limitations will run, will, of course, vary according to the view taken of what is the real cause of action. It is not until a comparatively recent date that the law of support has been minutely examined, and I think it is certain that the true principle of the law of support had not been arrived at when the case of Nicklin v. Williams, *ubi sup.*, was decided. It seems to me that in that case the view which the learned judges took was this, that the true cause of action in case of subsidence of ground was the withdrawal of the support and the interference with the legal right of the plaintiff to have his land, or his ancient buildings standing thereon, supported. I do not say that this was necessary to the decision, but I think it is plain that this was the view in the learned judges' minds when they came to that decision. Parke, B., says: "We think this action is for an injury to a right; and consequently there was a complete cause of action when the wrong was done, and not a new cause of action when damage was sustained by reason of the original wrong. When so much of the land, coal, or substratum was taken away as to deprive the plaintiffs' land and house of the support to which the plaintiffs were entitled, a cause of action accrued, though no actual damage occurred by the sinking of the land or falling of the house." And at the end of his judgment he distinguishes such cases as Gillon v. Boddington, 1 R. & M. 161, and Roberts v. Read, 16 East, 215, on the ground that they are not cases of injury to a right, but only actions for damages consequent upon an act done which in itself gave no right of action until damage accrued. I cannot help coming to the conclusion that a great deal of the foundation of the reasoning in Nicklin v. Williams is altogether cut away when we come to the case of Backhouse v. Bonomi, *ubi sup.* In that case the House of Lords, following the Exchequer Chamber, decided that the right of a party whose land is interfered with is not, in the words of Lord Cranworth, "a right to what is called the pillars or the support;" that is, not an absolute right of support, but that in truth his right is a right to the ordinary enjoyment of his land; and, till that or-

dinary enjoyment is interfered with, he has nothing of which to complain. It must, therefore, follow from this that the view which I have referred to as taken in Nicklin v. Williams, *ubi sup.*, is to a great extent displaced. There are, however, two views still left open by Backhouse v. Bonomi, *ubi sup.*, which run very close thgether, and which, perhaps, merge into one another. It may be thought that the real cause of action, when a person is deprived of support, and when, in consequence, his land subsides, is the interference with the enjoyment of his property which is caused by a subsidence. Or it may be a strictly different logical view to suppose the subsidence itself to be a damage done to the plaintiff's land in consequence of the withdrawal of the support to which the land was entitled. Backhouse v. Bonomi, *ubi sup.*, seems to me to leave it doubtful which of these two slightly different ways of looking at the same thing should be adopted. For myself I confess that I am not afraid to lay down the principle which Cockburn, C. J., adopted in Lamb v. Walker, *ubi sup.*, that each fresh interference with the enjoyment of property is, as it arises, a wrong done, and creates a new cause of action; that each subsidence, as it is occasioned, becomes as it arises a fresh interference with the enjoyment of the neighbor's property, provided it is an appreciaple and substantial interference, and therefore each subsidence itself creates a new cause of action. I know that this may, perhaps, lead to a conflict with the case of Smith v. Thackerah, *ubi sup.*; but whether that is so or not, it seems to me enough to say in this case, that here the subsequent subsidence is in any view a damage which, united with the previous excavation, or continuation of the excavation, gives a right of action. As to the case of Whitehouse v. Fellowes, *ubi sup.*, I do not go quite so far as the Master of the Rolls and say that that case is irreconcilable with Nicklin v. Williams, *ubi sup.*, and there certainly are distinctions between the case of Whitehouse v. Fellowes and the present case; but, applying the reasoning of Whitehouse v. Fellowes, it seems to me that there has been a continual withdrawal of support, that is to say, not merely an original act the results of which remain, but a state of things continued which has led to and caused the subsequent damage. As long then as the defendant continued that state of things and damage arose from it, it is right to treat the state of things as running from the time the damage was caused, because it is impossible to join the damages exclusively to the act of excavation and to dissever them entirely from the continuance of a state of things which was harmful. It is at this point that the argument of Cockburn, C. J., as to the inconvenience of holding the opposite view comes in, because, as he points out, if damages are to be recovered once for all, an injustice may be done, because a man may be compelled to pay for consequences which it is possible for him to prevent at any moment he likes to do so. In this case, therefore, I am of opinion that the plaintiff is entitled to succeed, and is not to be defeated merely because the original excavation, from the continuance of which damage has recently resulted, took place twelve years ago.

Fry, L. J.—I am entirely of the same opinion, and I will briefly express my reasons for concurring in the judgments of my learned brethren. In the first place, with reference to authority, it seems to me that we are free to decide this case on principle. In case of Nicklin v. Williams (*ubi sup.*) has been very properly pressed upon us as a binding authority, as having received the concurrence of the Lord Chancellor in the House of Lords, and if it had stood alone in that way it might have been difficult for us not to feel ourselves bound by the weight of authority; but it seems to me to be quite impossible to treat the case of Nicklin v. Williams as a binding authority, and at the same time to carry to its logical conclusion the principle laid down by the House of Lords in the case of Backhouse v. Bonomi (*ubi sup.*), in which the former case is cited with approval by the Lord Chancellor. We are therefore in this position, that we must either follow the logical results of the decision of the House of Lords in that case, and in so doing discard Nicklin v. Williams (*ubi sup.*), or we must adopt Nicklin v. Williams because it has been sanctioned by the Lord Chancellor, and refuse to follow to its logical conclusion the principle laid down by the House of Lords in Backhouse v. Bonomi. This being the state of the authorities, I think we are bound to determine this question upon principle. Now, with reference to principle, I think that all damage which arises from one and the same cause of action must be sued for and recovered at one and the same time, and therefore it becomes necessary to inquire what the cause of action is in a case of this description. Bowen, L. J. has pointed out that the cause of action may be stated in two ways. It may be said that the subsidence caused by the defendants is itself an interference with the property of the plaintiff, and as such is itself the cause of action; or it may be said that the defendants' allowing the excavation to continue without proper support to the surface so as to occasion damage to the plaintiff is the cause of action. I do not think it is very material to inquire which of the two is the more accurate way of stating the cause of action. I am inclined to agree with Bowen, L. J. that the subsidence, the result of the acts or omissions of the defendants, is an interference with the property of the plaintiff, and as such is itself the cause of action. If this be so, then it is plain that a second and independent subsidence is an independent cause of action. But even if the other view is the more correct one, even then it appears to me that the cause of action is not the same in the case of a second subsidence as in the case of the first, and for this reason: that whereas the cause of action in the case of the first subsidence may be said to be the excavating a cavity and not

supporting the surface, the cause of action in the second case may be said to be the continued act of omission which leaves the cavity in such a condition as to be continually liable to cause damage to the plaintiff. The mere withdrawal of the stratum of coal in itself is a perfectly legitimate act, and it is only because it is done without doing something else which would prevent injury to the plaintiff that the cause of action arises. I desire to make one other observation. It has been suggested that the excavation, though in itself a lawful act, may become wrongful in consequence of a subsequent subsidence following upon it. I do not think that position can be maintained, because I confess, it seems to me difficult to suppose that an act, lawful at the time it was done, can become unlawful in consequence of the subsequent effect of it. But supposing this to be so, it would then follow that the excavation was only wrongful to the extent of the subsidence that had already occurred, and therefore it seems to me impossible, in an action at the time when one subsidence has occurred, to recover damages not only for the subsidence that has made the excavation wrongful, but also for a subsidence which has not occurred and therefore which cannot have made the excavation wrongful in respect of that future subsidence. I do not desire to add more, inasmuch as the judgment of Cockburn, L. C. J. in the case of Lamb v. Walker (*ubi sup.*) seems to me to state the principle which I wish to adopt.

Appeal allowed.

NOTE.—When does a cause of action accrue within the meaning of the Statute of Limitations in cases of torts—whether at the time of the doing of the act which subsequently causes the injury, or at the time an actual injury is suffered?

It is elementary that the statute begins to run from the time the cause of action accrues; and, consequently, in determining whether or not a cause of action is barred, it is essentially necessary to ascertain the earliest moment at which the action could have been successfully brought. If there is a wrong done but no legal damage done, a suit cannot be successfully maintained at the time the wrong is done. "There must be not only a thing done amiss, but also a damage, either already fallen upon the party, or else inevitable." Waterer v. Freeman, Hob. 267 a. In illustration of this statement it was said in one of the Year Books (19 Hen. VI. 44.) "If a man forge a bond in my name, I can have no action, yet; but if I am sued, I may, for the wrong and damage, even though I may avoid the bond by plea."

When the injury however slight is complete at the time of the commission of the act, the statute begins to run. Woodsworth v. Harley, 1 B & Ad. 391. But if the act is not legally injurious until certain consequences occur, the statute begins to run from the consequential injury. Roberts v. Read, 16 East, 215; although the statute declares that the limitation begins to run from the date of the "fact committed," the court extending the meaning of this term so as to make consequential damage one essential part of the fact referred to. Gillon v. Bodington, 1 Car. & P. 541.

Thus where the injury was received by the plaintiff by reason of a defect in the sidewalk of a city it was held that the cause of action accrued at the time the injury was done, although the extent of the injury was not then known to the plaintiff, and from that date the statute began to run. Leroy v. Springfield, 81 Ill. 114; Crawford v. Goulden, 33 Geo. 173. These cases differ from the principal case. The injury was completely done, although unknown to the injured person; but in the principal case a new injury was done by the second sinking of the ground, and this second sinking was caused by the negligence of the defendant,—a negligence arising or taking place after the first injury was caused. Thus viewed, the second sinking was a new case of action, for it was caused by defendant's failure to prop up the surface, which was a continuing responsibility and duty resting upon him.

So the fact that a person injured by a railroad accident does not recover for a long time does not extend the time of his right to bring an action for the injury received. Piller v. Southern Pacific R. R. Co., 52 Cal. 42; Gustin v. Jefferson, 15 Iowa 158. In these cases the special damage was not revealed, on the exact amount of the damages ascertained, until long after the right of action accrued, and perhaps after the right was barred, yet this did not exceed the failure to bring the action; for the jury could have given prospective, or rather say by their verdict, what the present and future damages were as viewed from the time of the verdict.

Thus where an attorney neglected to prosecute a claim until it became barred by the statute; and he was neither guilty of fraud nor concealment, it was held, in an action against him for damages, alleging special consequential damages, that the statute began to run in his favor from the time of the breach of duty, although the special damage was not revealed or made definite until later. Moore v. Juvenal, 92 Pa. St. 484; s. c. 39 Amer. Rep. 794. But this case differs from the principal case in this; that no new act or neglect of the attorney caused the special damage, while in the principal case a new neglect did cause the second damage, when in the absence of such new neglect no second damage would have occurred. For a case similar to the Pennsylvania case, see Wilcox v. Plummer, 4 Pet. 172. See Rhines v. Evans, 66 Pa. St. 192; s. c. 5 Amer. Rep. 364.

A railroad company constructed an insufficient culvert over a water-course, and the plaintiff's lands were flooded. In an action for damages, it was held that the statute did not necessarily begin to run against his right of action from the time when the culvert was built, but from the time that he sustained damage. Union Trust Co, v. Cuppy, 26 Kan. 754. So where a railroad built an obstruction which caused the waters to flow over the plaintiff's land, but was abandoned by the the company and cut through by other persons, and afterwards rebuilt by the railroad company, it was held that the statute did not begin to run until the rebuilding of the obstruction. Little Rock & Ft. Smith Ry. Co. v. Chapman, 39 Ark. 463. And where a railroad company located its road-bed across the plaintiff's farm, and crossed two sloughs therein, the water of which in its natural state was pure and ran over a grassy bottom; but the construction of the road-bed dammed up and diverted the water of one of them, and conducted the water for a long distance through loose sand and gravel into another slough, over which a culvert was constructed; and the water thus flowing through the loose sand and gravel from the first named slough bore a large quantity of dirt which was deposited upon the plaintiffs' land; it was held, the injury being shown by the evidence to be permanent, and that the first injury occurred three years after the road-bed was built (the jury by special verdict so finding), that the statute began to run from the date of the actual injury, and not from the date the road-bed was built.

Van Orsdol v. B. C. R. & N. R. Co., 56 Iowa 470. See Powers v. The City of Council Bluffs, 45 Iowa, 652.

To obstruct a water-course or highway, or even divert the water of the former, gives a right of action immediately although no actual damage has been sustained; and to wait until an actual damage is done is exceedingly hazardous to the plaintiff; for "the defendant, by a continued and uninterrupted adverse enjoyment, might set up a title in analogy to the time limited for the right of entry upon land, which could not be successfully opposed." Ang. Lim. Sec. 300. But if actual damages accrue before the defendant could in the manner just referred to, defeat the suit, the statute as to such actual damages begins to run from the time of the actual injury. But, in an action for flowing land it appeared that the defendant diverted the water of a brook by means of a ditch and levee, which when first constructed did not injure the plaintiff's land, except at times of great floods. Subsequently the ditch became partially filled with sand, and the plaintiff's land suffered in consequence from the flow of water upon it. It was decided that as no action could accrue to the plaintiff until he was injured, the defendant could begin to acquire no title by prescription to such injurious use of his ditch until the same time. Polly v. McCall, 37 Ala. 20. Yet, under the Minnesota statute with reference to mill-dams interrupting the flow and raising the level of water, the statute does not begin to run until the wall or structure, intended as a dam, interrupts its flow and raises the level of the water and damage is occasioned. Thornton v. Turner, 11 Minn. 336. And in Tennessee the statute to obstructions of a highway begin to run from the end of each month during which the obstruction is continued,—a new cause of action accruing each month. Bufford v. Hinson, 3 Head. 573.

"Every continuance of that which was originally a nuisance the law considers a new nuisance, and, therefore, though the party complaining cannot in an action on the case, recover upon the original cause of action, after the expiration of six years, he may for its continuance at any time before the right of entry is barred * * * and recover not only nominal damages, but such actual damage as has accrued any time within six years." Angel on Lim. Sec. 300; Staples v. Spring, 10 Mass. 72; Holmes v. Wilson, 10 Ad. & El. 503; McConnell v. Kibbe, 29 Ill. 483; Delaware, etc. v. Lee, 2 N. J. L. 243; Bridleman v. Foulke, 5 Watts. (Pa.) 308.

The case of Powers v. The City of Council Bluffs, 45 Iowa 652; s. c. 24 Am. Rep. 792, is regarded as an anomalous one. (See Woods on Limitations.) The city cut a ditch across the plaintiff's lot in order to straighten a stream of water runing along side of the street and across the lot. The ditch so dug was three feet higher at its mouth than the ditch into which it emptied; and the action of the water falling wore away the dirt, widened the ditch ten times its first width, and ruined the plaintiff's lot. The ditch was cut in 1859, and the plaintiff began to sustain damages, by the caving in of the dirt and wearing away, in 1866. It was held that the plaintiff's cause of action accrued in 1859 and was barred in five years. This was upon the ground that the nuisance was of such a character, when created, that its continuance was necessarily an injury, and was of a permanent character, continuing without change from any cause of human labor, and that the damage was original damage and could at once be fully compensated; and that the statute began at once to run on the action for damages. The court relied upon Troy v. Cheshire, R. R. Co., 3 Fort. (N. H.) 83; which, upon close examination is clearly distinguishable from those before it; for in the latter there was a permanent object, a road-bed, which caused the damage; and no subsequent action of the bank was possible or that of the water in the Iowa case. See Kansas R. R. Co. v. Mihlman, 17 Kan. 224.

A damage and injury must concur to enable the plaintiff to successfully maintain his cause of action; and a new action may be brought as often as new injuries and wrongs are repeated; but a new suit for every fresh damage will not lie. Hambleton v. Veere, 2 Saund. 169, 171; Hodsoll v. Stallebrone, 39 E. C. L. 94; s. c., 3 P. & Dav. 203. So that in a case of an assault and battery, the statute begins to run from the time the battery takes place, although in after years a disease put in motion by the battery may result in serious, or even fatal, disablement of the injured person. 1 Salk. 11; Sheriff v. Bradshaw, 1 Cro. Eliz. 53; Whitney v. Clarendon, 18 Vt. 258. But where the defendant enticed away the plaintiff's wife and kept her until after suit brought; the detention subsequent to the bringing of the suit was held to authorize a new suit for that part of the injury. Brasfield v. Lee, 1 Ld. Raym. 329. Yet where a father brought suit for an injury to his child, and the suit was limited to the injury up to the time of the suit, it was held that a second suit for loss of service, arising by reason of injurious effects of the first injury after the first suit, could not be maintained. Whitney v. Clarendon, 18 Vt. 252. See Waller v. Chicago, 11 Ill. App. 209.

If the measure of damages is dependant upon the result of another suit, still the statute begins to run from the time the injury is inflicted; although only nominal damages could then be recovered. But such a decision hardly seems to be an equitable one. Baltley v. Faulkner, 3 B. & A. 288; Howell v. Young, 5 B. & C. 254; Kerns v. Schoomaker, 4 Ohio, 331; s. c., 22 Am. Dec. 757.

Thus an action for an injury done to the freehold was held not to lie until after the recovery in ejectment; and if the injury was done more than the time of limitation before the commencement of the suit, and the defendant pleads the statute, he must prevail, though the injury was done after the commencement of the ejectment, and the defendant prevented a judgment in the ejectment suit by an injunction in chancery. Morgan v. Varick, 8 Wend. 587.

If an officer has been guilty of negligence in serving legal process in his hands by the plaintiff's act, the latter's cause of action does not accrue at the time of the negligence, but when he sustains an actual and perceptible damage as the result of such damage; and as a consequence his right of action is not barred until the statutory period has elapsed after the concurrence of such damage. Bank of Hartford Co. v. Waterman, 26 Conn. 324. See Williams v. Mostyne, 4 M. & W. 145; Plank v. Anderson, 5 T. R. 37; Clark v. Smith, 9 Conn. 386; Lewis v. Morland, 2 B. & Ald. 64; Randell v. Wheble, 10 A. & E. 719. Thus where an officer took insufficient sureties on a replevin bond, it was held that the statute began to run from the time of the failure to return the property. Harriman v. Wilkins, 2 App. (Me.) 93.

But contrary to the decision just cited, it was held that if a sheriff, in opposition to his instructions, neglects to attach sufficient property, as he might have done, a cause of action arises against him on the return of the writ, and the statute then begins to run, and not from the time when, by levy of the execution, the insufficiency of the property is ascertained. Betts v. Norris, 8 Shep. (Me.) 314 (dissented from in Bank of Hartford Co. v. Waterman, 26 Conn. 324); Garlin v. Strickland, 27 Me. 443; And the right of an attorney against an execution officer for taking insufficient bail accrues when the attorney's lien for costs is perfected by the rendition of the judgment. Newbert v. Cunningham, 50 Me. 231. See, also, Mather v. Green, 1 Mass. 60.

In Iowa, it has been decided that the statute does not begin to operate upon a cause of action against a clerk of a court for negligence in accepting an insufficient staybond, until the stay expires, and a right of action accrues on the bond. Steel v. Bryant, 49 Iowa, 116.

In an action for false imprisonment the statute begins to run from the time of the release, and not from the time the imprisonment commences; for it does not lie in the mouth of the wrong-doer in such a case to say that the injured person should have commenced the action at the time he was first restrained of his liberty when he, the defendant, had it in his power to prevent the bringing of such an action. Dusenberg v. Keiley, 8 Daly (N. Y.), 159; Egginton v. Lichfield, 32 E. L. & Eq. 237.

But in an action for a malicious arrest, the statute begins to run from the time of the arrest; for in such a case it is not presumed that the detention of the plaintiff was of any extended time. Pratt v. Page, 18 Wis., 337.

False imprisonment after suit brought, although a continuation only of that for which the suit was brought, is a new injury for which a new suit may be brought. Brasfield v. Lee, 1 Ld. Raym. 329.

In an action by a father for the loss of his daughter's services in consequence of her seduction by the defendant, the limitation does not begin to run until the loss has actually accrued, and not from the act of seduction; for, in such a case, the gist of the action is loss of service and not the seduction. Hancock v. Wilhite, 1 Duv. (Ky.) 313.

So where the defendant enticed away the plaintiff's wife and kept her until after suit brought, it was held to be a new injury for which a second suit would lie. Brasfield v. Lee, 1 Ld. Raym. 329.

A cause of action against a recorder of deeds for damages suffered by reason of his giving a false certificate of search, arises, when the search was given and the plaintiff parted with his money on the faith of it; not from the development of the damages. Owen v. Western Saving Fund, 97 Pa. St. 47.

Proscription cannot avail as a defense to an action against a railroad company for intolerable noise and smoke in a city street; the causes and effects being renewed *de die in diem*. Werges v. St. Louis, etc. R. Co., 35 La. Ann. 641. So the cutting and carrying away of timber is a continuous trespass, and the statute begins to run from the time of the completion of the carrying away. Sullivan v. Davis, 29 Kan. 28.

W. W. THORNTON.

Crawfordsville, Ind.

## WEEKLY DIGEST OF RECENT CASES.



1. ATTACHMENT. [*Pension Money.*]—*When not Exempt from Attachment.*—Pension money, after it is received by the pensioner, is not exempt from attachment. [In the opinion of the court by Peters, C. J., after arguing the question on principle, and referring to Knapp v. Beattice, 70 Me. 410, it is said: "There are decisions favoring our view of the question. The Iowa court has twice affirmed the same view. Triplett v. Graham, 58 Iowa, 136. In Webb v. Holt, 57, id. 712, it was said that 'the exemption applies only to money due the pensioner, while in course of transmission to him, and that there is no exemption after it comes into his possession.' In Jardain v. Fairton Sav. Fund Assn., 44 N. J. L. 376, the same conclusion was reached, where it is said by the court: 'The fund is not placed in the hands of the pensioner as a trust, but it is to inure wholly to his benefit. When it comes to him in hand or personal control, it is his money as effectually and for all purposes as the proceeds of his work or labor would be, and whether he expends it in new contracts, or it be taken to pay the consideration due from him for those of the past, it equally inures to his benefit.' In Spelman v. Aldrich, 126, Mass. 113, it was held that 'even if, by the laws of the United States, the pension was exempt from attachment while it remained it the form of a pension check, the exemption ceased after the money was drawn upon the check.' Cranz v. White, 27 Kans. 319; S. C., 41 Am. Rep. 408 and note, is to the same effect. In Haywood v. Clark, 50 Vt. 612, a case not directly calling for a decision of the question, a different view is intimated."] *Friend v. Garcelon*, S. C. Me., Jan. 5, 1885; 1 Eastern Repr. 57.

2. CONSTITUTIONAL LAW. [*Special Legislation.*]—*Act making it Punishable for Person in City of first Grade, first Class, to have Burglar Tools in his possession, unconstitutional.*—1. The clause of the constitution, Art. 2, § 26, providing that "all laws of a general nature shall have a uniform operation throughout the State," is not directory, but mandatory, and a statute in violation of it is void. 2. A statute providing punishment for an act which is *malum in se* wherever committed, being a law of a general nature, cannot be made local on the ground that the inhibited act is a greater evil in a large city than in other parts of the State. [On this point Owen and Johnson, J. J., dissented.] 3. Ohio Rev. Stats., § 1924, which provides punishment by fine and imprisonment against any person found in a city of the first grade of the first class, or within four miles thereof, having burglar's tools in his possession, is a law of a general nature within the inhibition of the constitution, Art. 2, § 26, but being local in form, it is void. [On this point Owen, J., doubting.] *Ex parte Falk*, S. C. of Ohio, March 3, 1885; 13 Week. Law Bull. 302.

3. EVIDENCE. [*Negative Testimony.*]—*Testimony of a Witness who did not hear the Signal, when Sufficient to take to the Jury the Question whether it was sounded.*—The testimony of a witness, who was near a railway crossing where an accident happened, was listening for the bell of the locomotive, and said he would have heard it if sounded, that no signal was sounded, together with that of other witnesses, who claimed to be in a position to hear, that they did not hear it, is sufficient evidence to support a verdict against a railroad company for negligence. In the opinion of the court it is said by Sterrett, J.: "It was neither admitted nor shown by undisputed evidence that the bell was rung as claimed by defendant's counsel. Several witnesses, who claimed to have been in a position to hear it, if it was rung, testified, that they did not hear it. It may be well said, this is merely negative testimony, and of little weight; but one of the witnesses testified, in substance,

that he was quite near the crossing, and for a particular reason which he stated, was listening to a signal, and if a whistle had been sounded or a bell rung before the train reached the crossing, he would undoubtedly have heard it. This evidence could not be ignored. In connection with the testimony of other witnesses it was sufficient to carry the question of fact to the jury. The evidence furnished by their testimony was more than a mere *scintilla*, and the testimony of the witness who said he was listening for a signal, is of a higher grade than mere negative testimony. Kelly v. Railroad Company, 6 Am. and Eng. R. Cases, 95. As we have heretofore held, the preliminary question of law for the court undoubtedly is, not whether there is literally no evidence, or a mere scintilla, but whether there is any that ought reasonably to satisfy the jury that the fact sought to be proved, is established. If there is evidence, from which the jury can properly find the question for the party on whom the burden of proof rests, it should be submitted; on the other hand, if the evidence is wholly insufficient to justify the jury in thus finding, and the court would feel bound to set aside the verdict if they did so find, the testimony should be withdrawn from the consideration of the jury. Hyatt v. Johnston, 10 Norris, 196. In view of the testimony in this case, we are of opinion that it does not fall within the latter branch of this rule, and hence the question of negligence in not giving sufficient and timely warning of the approach of the train, should have been submitted to the jury for their determination, under all the testimony before them."] *Longenecker v. Pennsylvania R. Co.*, S. C. Pa., Oct. 6, 1884; 15 Pittsb. Leg. Jour. (N. S.), 342.

4. EVIDENCE. [*Quantum of Proof.*]—*Quantum of Evidence to Impeach a Writing.*—The uncorroborated testimony of one witness is not sufficient to set aside or alter a written contract. [In so holding, Trunkey, J., in giving the opinion of the court, said: "To overthrow a written contract it is necessary that the parol evidence be clear, precise and satisfactory. It has sometimes been said that the evidence must be clear, precise and entirely satisfactory, or full, satisfactory and indubitable; but the context showed that such expressions did not mean that it is requisite that the evidence should lead to a certain conclusion. If used, it should be manifest that the jury understood them in the sense of the rule: 'Where written instruments are sought to be reformed, juries must not hesitate or doubt; they must have clear convictions, they must believe the witnesses, and must find the facts in issue definitely and distinctly established.' Absolute certainty is out of the question where facts are to be found from oral testimony and circumstances. Spencer v. Colt, 89 Pa. St., 314. The jury determine facts according to the weight of evidence, and not by it sufficiency to produce conviction of the absolute certainty of the conclusion arrived at. If the evidence produces a clear conviction, without hesitancy, of the truth of the precise fact in issue, it is sufficient. The law does not require proof so convincing as to leave no doubt resting on the minds of the jurors; it is enough if there be evidence to satisfy an unprejudiced mind beyond reasonable doubt. Young v. Edwards, 72 Pa. St., 257. The first and fourth assignments must be sustained, whether the instructions as to the high degree of proof or confidence is applied to witness or to the testimony." *Ott. v Oyer*, S. C. Pa., May 9, 1884; 15 Pittsb. Leg. Jour. (N. S.) 471.

5. FRAUDULENT CONVEYANCE [*Creditor's Bill*]—*Purchaser at Execution Sale may Maintain.*—A purchaser of real estate at an execution sale may in equity avoid conveyances previously made by the judgment debtor in fraud of his creditors. [In the opinion of the court Durfee, C. J., says: "In Beckwith v. Burrough, 30 Alb. L. J. 542, we had occasion to remark that there is a conflict of decision on this point and to cite the cases, but without expressing any definite opinion. Now, however, after further consideration, our conclusion is that the suit is maintainable, the jurisdiction in equity and at law being generally concurrent in cases of fraud. See cases and authorities cited for complainants: Snell's Principles of Equity, 384; 1 Spence's Eq. Jur. 625; May on Fraudulent and Voluntary Conveyances, 472; 1 Story's Eq. Jur. § 68; Bennett v. Musgrove, 2 Ves. 51; Colt v. Woollaston, 2 P. Wms. 154; Evans v. Bicknell, 6 Ves. Jun. 173; Slim v. Croucher, 1 DeG. F. & J. 518; St. Aubyn v. Smart, L. R. 5 Eq. 183; also on appeal, L. R. 4 Ch. App. 646; Ramshire v. Bolton, L. R. 8 Eq. 294; Hill v. Lane, L. R. 11 Eq. 215; Hartshorn v. Eames, 31 Me. 93; Lillard v. McGee, 4 Bibb, 165; Dodge v. Griswold, 8 N. H. 425; Abbey v. Commercial Bank of New Orleans, 61 Miss. 434; Wampler v. Wampler, 30 Gratt. 454: Crane v. Conklin, 1 N. J. Eq. 346; Lewis v. Cocks, 23 Wall. 466; Gray v. Jenks, 3 Mason, 520; Brown v. Stewart, 56 Md. 421; Bunce v. Gallagher, 5 Blatchf. 481; Flint & P. M. R. Co. v. Gordon, 41 Mich. 420; King v. Carpenter, 37 id. 363; Eaton v. Trowbridge, 38 id. 454; Methodist Church of Newark v. Clark, 41 id. 730; Allen v. Waldo, 47 id. 516; Sands v. Codwise, 4 Johns. 536."] *Belcher v. Arnold*, S. C. R. I., Jan. 17, 1885; 1 Eastern Repr. 38.

6. HUSBAND AND WIFE [*Necessaries*]—*Impliedly Chargeable to Husband, and not to Wife.*—Where husband and wife are living together, the legal implication that for goods purchased for ordinary domestic use in a family the husband, and not the wife, is liable, can be overcome so as to charge the wife with liability only by proof of an express contract on her part, or of circumstances, other than the fact that she procured the goods, fairly establishing a case of implied contract. Evidence considered insufficient to show a liability on the part of a wife for goods purchased in part by her. [In giving the opinion of the court, Dickinson, J., says: "The defendants were living together as husband and wife, and the plaintiffs knew this fact when they sold the goods. The husband interposed no defense. The wife denying any contract on her part, the issue was tried in the district court with a jury. Upon the evidence on the part of the plaintiffs, the court dismissed the action as to the wife. There was no error in directing a nonsuit. Under the circumstances above referred to, the legal implication was that the purchases, although made by the wife, were on account of the husband; and before the wife can be charged with liability, this implication must be overcome by proof that by her express contract, or by circumstances other than the purchase of the goods by her, fairly establishing a case of implied contract, she had assumed an individual responsibility. Flynn v. Messenger, 28 Minn. 208; s. c. 9 N. W. Rep. 759; Wilson v. Herbert, 41 N. J. Law, 454. In this the plaintiffs' case was deficient."] *Chester v. Pierce*, S. C. Minn., May 18, 1885; 23 N. W. Repr. 539.

7. INDEMNITY—*Goods Seized for Debt of Another—Owner Entitled to Indemnity from Debtor.*—Goods on premises of which defendant was tenant,

but where defendant's sons carried on business, were seized under a judgment against defendant. The sons claimed the goods, but on an interpleader summons their claim was barred. The sons became bankrupt, and defendants promised their trustee that, in consideration of his sons' goods having been seized and sold for a claim against him, he would pay the trustee a sufficient sum to pay his sons' trade creditors in full. In an action by the trustee: *Held*, (affirming the judgment of Huddleston, B.), that as defendant's own conduct had led to the seizure of the goods, and as he had failed to show that the seizure was wrongful, he was bound to indemnify his sons, and therefore, whether defendant's express promise was legally binding or not, plaintiff was entitled to recover the value of the goods. England v. Marsden, L. Rep. 1 C. P. 529, questioned. [In the judgment of the court, which was read by Lord Justice Lindley, it is said: "The first question is the liability incurred by the defendant to his sons by reason of the seizure of what he has deliberately asserted to be their goods for his debt. That as between the father and sons the goods were theirs, we consider established by the father's own statements. Speaking generally, and excluding exceptional cases, where a person's goods are lawfully seized for another's debt, the owner of the goods is entitled to redeem them, and to be reimbursed by the debtor against the money paid to redeem them, and in the event of the goods being sold to satisfy the debt, the owner is entitled to recover the value of them from the debtor. The authorities supporting this general proposition will be found collected in the notes to Lampleigh v. Brathwait, 1 Smith L. C. 151), and Dering v. Winchelsea, 1 White & Tud. L. C. 106. As instances illustrating its application, reference may be made to the case of a person whose goods are lawfully distrained for rent due from some one else, as in Exall v. Partridge (8 T. Rep. 308), to the case of a surety paying the debt of his principal, to the case where the whole of a joint debt is paid by one only of the joint debtors, to the case where the joint property of a firm is seized for the separate debt of the partners. The right to indemnity or contribution in these cases exists although there may be no agreement to indemnify or contribute, or although there may be in that sense no privity between the plaintiff and the defendant. This is shown by the case of Johnson v. Royal Mail Steam Packet Company (17 L. T. Rep. N. S. 445; L. Rep. 3 C. P. 38), where Willes, J., in delivering the judgment of the court, laid down the law in the following terms: "It has been decided in numerous cases that restraint of goods by reason of non-payment of the debt due by one to another is sufficient compulsion of the law to entitle a person who was paid the debt in order to relieve his goods from such restraint to sustain a claim for money paid." L. Rep. 3 C. P. at p. 45. But it is obvious that the right may be excluded by contract as well as by other circumstances. Where the owner of the goods seized is as between himself and the person for whose debt they were seized liable to pay the debt, it is plain the general rule is inapplicable, and this explains the case of Griffinhoofe v. Daubuz. There the plaintiff, who was the tenant of the defendant, sued him to recover the value of a stack of wheat distrained for tithe rent charge. The declaration alleged that the defendant was liable to pay, and ought to have paid, this rent-charge. The defendant, on the other hand, denied this alleged liability, and upon this part of the case the verdict was entered for the defendant, and the defendant succeeded in the action. The plaintiff, without attempting to disturb the verdict, applied for judgment *non obstante veredicto*, for alleged error on the record, on the ground that, although the defendant was not personally liable to pay the rent charge, yet that his farm and land were liable to pay it, and therefore he ought to indemnify the plaintiff. But it was held that many circumstances might exist rendering the plaintiff the person liable to pay the tithe rent charge, and that having regard to the verdict the record did not show that the defendant was liable to indemnify the plaintiff against it. The court said: "There is no allegation of any privity entitling the plaintiff to recover in any form of action." We are not sure that we quite appreciate the meaning of the word "privity" in this passage; but the truth seems to have been, that the merits as disclosed at the trial were against the plaintiff, and that the court was not disposed to be astute and to give him judgment after his failure at the trial. Another exception to the general rule has been held to exist where the owner of the goods has left them for his own convenience where they could be lawfully seized for the debt of the person from whom he seeks indemnity. England v. Marsden, L. Rep. 1 C. P. 529. The plaintiff in that case seized the defendant's goods under a bill of sale, but did not remove them from the defendant's house. The plaintiff left them there for his own convenience, and they were afterwards distrained by the defendant's landlord. The plaintiff paid the rent distrained for, and brought an action to recover the money from the defendant. The court, however, held that the action would not lie, as the plaintiff might have removed his goods before, and could not in the circumstances be considered as having been compelled to pay the rent. This appears to us a very questionable decision. The evidence did not show that the plaintiff's goods were left in the defendant's house against his consent, and although it is true that the plaintiff only had himself to blame for exposing his goods to seizure, we fail to see how he thereby prejudiced the defendant, or why having paid the defendant's debt in order to redeem his own goods from lawful seizure the plaintiff was not entitled to be reimbursed by the defendant. This decision has been questioned before by Thesiger, L. J., in *Ex parte* Bishop, 15 Ch. Div. at page 417, and by the late Vaughan Williams, J., in the notes to the last edition of Williams Saunders (vol. 1, p. 36), and we think the decision ought not to be followed. Be the case of England v. Marsden, however, right or wrong, it is distinguishable in its facts from the case now before us. In order to bring the present case within the general principle alluded to above, it is necessary that the goods seized shall have been lawfully seized, and it was contended before us that the son's goods were in this case wrongfully seized, and that the defendant, therefore, was not bound to indemnify them. But when it is said that the goods must be lawfully seized, all that is meant is that, as between the owner of the goods and the person seizing them, the latter shall have been entitled to take them. It is plain that the principle has no application except where the owner of the goods is in a position to say to the debtor that the seizure ought not to have taken place; it is because as between them the wrong goods have been seized that any question arises. Now in this case it has been decided between the owners of the goods seized (*i. e.*, the sons) and the

sheriff seizing them, that the goods were rightfully seized, and although the defendant is not estopped by this decision, and is at liberty, if he can, to show that the seizure was one which the sheriff was not justified in making, he has not done so. Indeed, the defendant's connection with his sons' business was such as to justify the inference that the sheriff had a right to seize the goods for the defendant's debt; and if in truth any mistake was made by the sheriff, the defendant had only himself to thank for it. His own conduct led to the seizure, and although he did not in fact request it to be made, he brought the seizure about, and has wholly failed to show that the seizure was wrongful on the part of the sheriff. The case, therefore, stands thus: goods which the defendant has admitted in writing to be his sons, have, owing to his conduct, been legally taken in execution for his debt, and the proceeds of sale have been impounded as a security for what is due from him to his execution creditors. The defendant, therefore, was liable to repay to his sons the amount realized by the sale of the goods. This liability the plaintiff, as the sons' trustee in bankruptcy, was in a position to enforce, and he has never released it, or agreed so to do except upon payment of £1,200. The plaintiff is in a position now to enforce that liability, if the defendant succeeds in showing that his express promise is not legally binding upon him. The plaintiff is content to take the £1,200 expressly promised to be paid instead of insisting on his right to the £1,300, and Huddleston, B., has properly given the plaintiff judgment accordingly. The appeal must therefore be dismissed with costs."] *Edmunds v. Wallingford*, English Court of Appeal, March 18, 1885; 52 Law Times Rep. (N. S.) 722.

8. KIDNAPING. [*Wisconsin Statute.*]—*What Necessary to an Indictment under Wisconsin Statute.*—The Wisconsin statute on the subject of kidnaping is as follows: "Any person who shall, without lawful authority, forcibly or secretly confine or imprison another within this State, against his will, or who shall forcibly carry or send another out of this State, or from place to place within this State, against his will, and without lawful authority, or who shall, without such authority, forcibly seize, confine, inveigle, or kidnap another, with intent to cause such person to be secretly confined or imprisoned in this State against his will, or to be sent or carried out of this State against his will, or to be sold as a slave, etc., shall be punished by imprisonment in the State prison not more than two years nor less than one year." Rev. St. Wis. 1878, § 4387. An information charging "that on a certain date, at a certain county, W. S. did feloniously, unlawfully, injuriously, willfully, and without lawful authority, forcibly confine and imprison, against his, the said A. B. E.'s, will, and him, the said A. B. E., then and there feloniously, and without any lawful authority, and against his will, forcibly did convey from a certain place in said county to H.'s store, in said county, against the peace, etc.," does not charge the crime of kidnaping within this statute, but merely the common-law offense of false imprisonment, and a party found guilty under such information can only be punished by imprisonment in the county jail not more than one year, or by fine not exceeding $250, as provided by section 4635, prescribing the punishment of a person convicted of an offense, the punishment of which is not prescribed by any statute. [The court examine the following cases: Com. v. Nickerson, 5 Allen, 518; Com. v. Blodgett, 12 Metc. 56; State v. McRoberts, 4 Blackf. 178; Moody v. People, 20 Ill. 315; Click v. State, 3 Texas, 282.] *Smith v. State*, S. C. Wis. June 1, 1885; 23 N. W. Repr. 879.

9. MALICIOUS PROSECUTION. [*Law and Fact.*]—*Malice and Probable Cause must Concur—Malice may be Inferred—Probable Cause Question of Fact or of Law when.*—Both malice and a want of probable cause must concur to warrant a recovery. Malice may be inferred from circumstances. When the facts are not contested and there is no conflict in the evidence, probable cause is a matter of law, otherwise it is a mixed question of law and facts, and must be submitted to the jury under appropriate instructions from the court. [In the opinion of Mr. Commissioner Watts, adopted by the Supreme Court of Texas, these observations occur: "Even though malice may be established, yet it will not unaided support the action; there must be a want of probable cause concurring with the malice before a recovery can be had. Among the very best definitions given of probable cause the absence or want of which is essential in actions for malicious prosecution, is that by the Supreme Court of the United States in Wheeler v. Nesbitt (24 How. 545), which is: "The existence of such facts and circumstances as would excite belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted." From this definition it is apparent that the existence, or non-existence of probable cause does not depend upon the prosecutor's belief of the party's guilt or innocence, or the existence of such facts and circumstances as might influence his judgment without regard to the effect it might have upon the judgment of others. Ordinarily probable cause is a question of law. Greenwade v. Mills, 31 Miss. 464; Cloon v. Gerry, 13 Gray, 201; Chapman v. Cawery, 50 Ill. 512; McWilliams v. Hoban, 42 Md. 56; Master v. Deys, 2 Wend. 424; Sweet v. Negers, 30 Mich. 406. When the facts are not contested, and there is no conflict in the evidence directed to that issue, the question of probable cause is a matter of law which is to be decided by the court. But where the facts are contested, or there is a conflict of evidence, then it becomes a mixed question of law and fact and must be submitted to the jury for determination upon appropriate instructions as to the principles of law by which the jury is to be governed in the investigation. [Diggs v. Benton, 44 Vt. 124; Heyne v. Blair, 62 N. Y. 19; Humphries v. Parker, 52 Me. 502; Cole v. Curtis, 16 Minn. 182.] *Ramsey v. Arrott*, S. C. Texas, June 5, 1885; 5 Texas Law Rev. 393.

10. ———. [*Evidence—Malice.*]—*Advice of Counsel Admissible on Question of Malice.*—In an action for damages for a malicious prosecution, the fact that the defendant instituted the prosecution upon the advice of counsel, to whom all the facts have been submitted, is admissible as tending to show good faith and disprove malice. [In the opinion by Mr. Commissioner Watts, adopted by the court, it is said: In respect to the advice of counsel, as a matter of defence in this character of cases, some confusion is found in the books. Evidence that the facts upon which the party proceeded in instituting and continuing the prosecution were submitted to an attorney who, upon a consideration of all the facts, if fully and fairly presented without any reservation whatever, advices that they are

sufficient to authorize the prosecution, is entitled to consideration in the determination of the issue of malice. But such evidence does not establish the existence of probable cause. Where good faith upon the part of the prosecutor is shown malice cannot be inferred, hence such evidence is admissible as tending to establish good faith upon the part of the prosecutor, and to repel any inference of malice that might be deduced from circumstances showing a want of probable cause. In Stanton v. Hart (27 Mich. 539), in reference to this character of evidence, it was remarked: "When a person resorts to the best means in his power for information it will be such a proof of honesty as will disprove malice and operate as a defence proportionate to his diligence." It is not true, however, that a resort to professional advice constitutes an independent and substantial defence to the action for malicious prosecution. The defence is that the prosecution was instituted and continued in good faith by the prosecutor, and such evidence is admissible as tending to establish that defence. A resort to professional advice under certain circumstances might be sufficient to establish good faith and repel any inference of malice, but it does not necessarily constitute a conclusive presumption against the existence of malice. Kimball v. Bates, 50 Me. 308; Brown v. Randall, 36 Conn. 56; Ames v. Rathburn, 55 Barb. 194; Glasscock v. Bridges, 15 La. 672; Prough v. Eutriken, 11 Penn. St., 81; King v. Ward, 77 Ill. 603.] *Ramsey v. Arrott*, S. C. Texas, June 5, 1885; 5 Texas Law Rev. 393.

11. MARRIED WOMEN. [*Mortgage.*]—*Valid, Although Note Creates no Personal Liability.*—A mortgage executed by a married woman to secure a note given for the benefit of another is valid, and may be foreclosed, although she would not be liable personally on the note. [In the opinion of the court Campbell, J., said: "There is no restriction under our constitution and statutes which will prevent a married woman from creating express liens on her property, for any lawful purpose that could be the foundation of such action on the part of an unmarried woman. A mortgage to secure another person's debt is valid beyond question. That was really the purpose of this mortgage. The right to enforce a note personally is not necessary to make a mortgage securing it good. The defense of the statute of limitations or bankruptcy may defeat altogether any personal claim, but will not destroy the mortgage lien. Michigan Ins. Co. v. Brown, 11 Mich. 265; McKinney v. Miller, 19 Mich. 142; Powell v. Smith, 30 Mich. 451. As defendant saw fit to give an express mortgage security upon a lawful consideration, we do not think it is invalidated by the fact that she cannot be sued on the note. Under the old decisions upon equitable separate estates, such a note would have bound her separate estate without a mortgage. Under our decisions the lien must be express. But there is no reason for holding that such a note will vitiate a security which refers to it as descriptive of the debt secured. The intention of the mortgage is lawful, and the lien on the property is clearly defined. Nothing more is needed to bind the land."] *Damon v. Reeves*, S. C. Mich., June 10, 1885; 23 N. W. Repr. 798.

12. NEGLIGENCE. — *Contributory Negligence Induced by Defendant's Misconduct no Excuse.*—When a passenger by railway with his wife and children, is in the act of alighting from the train stopped at a station, and when the wife with an infant in her arms, having reached the lower step of the car, is thrown violently to the ground by the sudden starting of the car, the husband's act in jumping off to her assistance while the train is in motion and leaving his other children of tender years on the platform, one of whom is injured in attempting to jump off after her parents, is not such contributory negligence as debars recovery for injury to the child. The acts of both the father and the child were the direct consequences of defendant's own misconduct, and falls within the well settled rule that contributory negligence cannot be set up as a defense when such negligence was the result of tremor or excitement produced by the defendant's misconduct, or when the latter puts the plaintiff to a sudden election between the course which he took or submitting to a grave inconvenience. *Lehman v. Louisiana W. R. Co.*, S. C. La., Opelousas, July, 1885.

13. NEW TRIAL. [*Nominal Damages.*]— *Whether Granted to Enable Plaintiff to Recover Nominal Damages Merely.*—Where the case is such that on a new trial the party complaining of error would be entitled to recover nominal damages only, which would not carry costs [Strong v. Daniels, 3 Mich. 466; Dikeman v. Harrison, 38 Mich. 617], a new trial will not be awarded unless the protection of substantial rights requires it. [Hickey v. Baird, 9 Mich. 32; Haven v. Manuf'g Co., 40 Mich. 286.] *Lewis v. Flint, etc. R. Co.*, S. C. Mich., May 13, 1885; 23 N. W. Repr. 469; S. C., 19 N. W. Repr. 469.

14. PLEADING. [*Fraud.*]—*Facts Constituting must be Alleged.*—A replication of fraud to a plea of release must set out the fraudulent acts relied on, that the court may determine whether they amount to fraud, and that the defendant may know on what to take issue. [Citing: J'Anson v. Stuart, 1 Term Rep. 748, 752, 753; Wallingford v. Mutual Society, L. R. 5 App. Cas. 685, 697, 701, 709; S. C., 34 Eng. Rep. 65; Service v. Heemance, 2 Johns. 96; Brereton v. Howe, 1 Denio, 75; Weld v. Locke, 18 N. H. 141; Bell v. Lamprey, 52 N. H. 41; Sterling v. Mercantile Ins. Co., 32 Pa. St. 75; Hopkins v. Woodward, 75 Ill. 62; Cole v. Joliet Opera House, 79 Ill. 96; Darnell v. Rowland, 30 Ind. 342; Hale v. West Virginia Co., 11 W. Va. 229; Capuro v. Builders' Ins. Co., 39 Cal. 123; Hynson v. Dunn, 5 Ark. 395; Abraham v. Gray, 14 Ark. 301; Giles v. Williams, 3 Ala. 316.] *Friedburg v. Knight*, S. C. R. I., Dec. 29, 1884; 1 Eastern Repr. 24.

## QUERIES AND ANSWERS.

*[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]*

### QUERIES.

7. What degree of care and diligence is required of a private carrier for hire in the transportation of a passenger? Please cite authorities. H.

Boston, July 30, 1885.

8. A. sold land by bond for title, and took notes for the purchase money. He sold one of the notes to B. by written endorsement, in the language "without recourse on me." The land is of insufficient value to

satisfy all the notes. Will B. be postponed till A. is paid in full. Will the assignment be "without recourse" if B. be allowed to trench upon the land to which A. has retained the title for his own security?

T. W.

Nashville, Tenn.

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9. The town of L. has about 1300 inhabitants; "A." owns about four acres of land about four blocks from the business part of town, on the bank of a creek flowing by the town. The city council thinks they want two or three acres of the land for a park. Can they compell "A." to sell to the city. Statute Iowa, Sec. 470. City council have power to purchase or condemn, and pay for out of general fund, and take lands, for use of public squares, streets, parks, commons, cemeteries or any proper or legitimate and municipal use, and to inclose, ornaments and improve the same?

SUB.

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### QUERIES ANSWERED.

*Query* 6. [20 Cent. L. J. 99, 500.] A woman owning land in fee simple, married. Children were born of this marriage. The husband, solvent at time of marriage, became insolvent in course of time. Suits were brought on his debts by creditors and judgment had. During the months intervening between the bringing of suit, and the obtaining judgment, husband and wife went into Chancery, and, on petition, her realty was settled on her as a *feme sole* free from debts, liabilities and control, etc., and with power of disposition by deed, will, or otherwise. The wife devised the land to her children and died. The creditors of the husband levied on what they supposed was the life estate of the husband, as tenant by the courtesy. The devisees enjoined the sale, by bill filed for that purpose, and to remove the cloud of the levy from their title. Whose is the better right, creditors, devisees, or children? Land is situated in Tennessee; all the occurrences took place in that State, and it is the domicil of all parties. Answer fully, and give authorities and reasons,

THERLMORE.

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*Answer.*—By the common law the personal property of the wife became the property of the husband as soon as it was reduced to possession. If the husband, or his assignee or creditors, were compelled to ask the aid of a court of equity to obtain control of her property, that court would refuse to aid them until a settlement of a proper part of her estate was made for the benefit of the wife and her children. This was termed the "wife equity." That equity it will be observed only arose when the property being dealt with was hers; and out of her own property was the settlement made. 1 Bish. on Mar. Women, § 624. One, not in debt, may give away his property if he pleases. But the general rule is that one who is indebted cannot give away his property to the prejudice of existing creditors, even though the gift be to his wife. The court of chancery by its decree might make provisions for the wife out of her own property and estate, but not out of the husband's. While the decree would be binding on the husband and parties to the suit it would not bind creditors, who were not parties, except so far as the court had jurisdiction to bind them. If the property settled upon the wife was hers it would bind. But the estate of the husband, as tenant by curtesy initiate, was not her property. "If a husband who is in debt undertakes to settle on his wife his interest in her lands, as tenant by the curtesy initiate, such a settlement will not be sustained against his creditors; because this estate is his own vested freehold, and as it is not his wife's he might as well undertake to settle on her any other of his property as this." 1 Bishop on Mar. Women, § 727; *Id.* § 646. See Van Duzer v. Van Duzer, 31 Am. Dec. 257 (6 Paige Ch. 366); Wickes v. Clarke, 8 Paige Ch. 172.

CROSBY JOHNSON.

Hamilton, Mo.

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*Query* 5. [21 Cent. L. J. 21.] A recovers a judgment against B in one State, and afterwards brings suit upon it in another State. In the meantime, B takes an appeal from the judgment sued upon, which operates a suspension of the judgment. Can he then plead *nun tiel* record to the action pending on the same in the second State, and have the transcript of the appeal inspected thereunder by the court, as being a part of the record upon which the action is brought?

M. T. FRAME.

Wheeling, W. Va.

*Answer.* Where an appeal is taken and proper proceedings had to stay proceedings on the judgment, an action will not lie on such judgment while the appeal is pending. Freeman on Judg., §§ 328, 433, 602; Clark v. Child, 136 Mass. 344; Campbell v. Howard, 5 Mass. 376; Ketchum v. Thatcher, 12 Mo. App. 185. But if the appeal does not suspend execution on the judgment an action may be maintained on it. Taylor v. Shew, 2 Am. Rep. 478; s. c., 39 Cal. 536; Faber v. Hovey, 19 Am. R. 398; s. c., 117 Mass. 107. Instead of pleading *nul tiel* record, the plea should be in abatement; should admit the judgment and show the grounds of its suspension. Freeman on Judgm., § 459; Jenkins v. Pepoon, 2 Johns. Cas. 312; Wemple v. Johnson, 13 Wend. 516.

CROSBY JOHNSON.

Hamilton, Mo.

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## JETSAM AND FLOTSAM.

"BLACKLIST" COLLECTING. — [*Detroit, July 11, 1885. Ed. Jetsam and Flotsam.*]—The "Blacklist" letter is unlawyerlike and dangerous. Common law is good authority that the claim must be first put in judgment to protect even a lawyer from libel. Better avoid all such claims; they will kill any attorney's business. A good name with his craft and the public will outweigh twenty times his profits on blacklist collections. This form is as suggestive as any attorney should use: "Please call early on a business matter to your interest." (You want him in the office.) Or say, this way: "We have a claim of $—— against you for collection, and wish you to avoid costs and suit if possible. The matter is from Chicago." A little vagueness will add interest to the creditor, and excite his curiosity. A face to face meeting in kindness usually secures an admission of the debt, or lines out the defense.

J. W. DONOVAN.